IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARNEST HAMMOND, Appellant,	)	AUG 23 1968
vs.	)	NO. 22589
UNITED STATES OF AMERICA, Appellee.	)	

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California denying appellant's motion under 28 USCA 2255, after a hearing with appellant present. [C. T. 19-23][1]

Jurisdiction of the District Court and this Court rests pursuant to 28 USCA 2255.

[1] "C. T." refers to the Clerk's Transcript.

II

STATEMENT OF THE CASE

Appellant was convicted of two counts involving smuggling and conspiracy to smuggle heroin under 21 USCA 174 and was sentenced to ten years on each of the two counts, to run concurrently.

Appellant appealed from the judgment of conviction, and the conviction was affirmed by this Court. (Hammond v. United States, 356 F 2d 931 (9th Cir. 1966))

Thereafter on March 23, 1967, he filed this motion. On September 22, 1967, the Honorable Fred Kunzel, United States District Judge, denied the petition, as previously stated.

On September 27, 1967, Notice of Appeal was filed.

III

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

1. The claim of being held incommunicado.
2. The denial of a favorable witness.
3. Lack of speedy trial.
4. Prejudicial statements by the prosecutor.

IV

STATEMENT OF THE FACTS

Appellant was arrested on Friday, September 25, 1964, and taken before the United States Commissioner at the earliest available opportunity on the following Monday [C. T. 20; R. T. 297].[2]

He was informed of his right to use the phone by Customs Agents Miller and Quick as well as officials at the jail. A notice was also posted informing appellant that he was entitled to two phone calls. The jail records indicate that he drew money to make a phone call. He was taken to the hospital there on two separate occasions, was permitted visitors on weekends, and could write and receive letters [R. T. 300-309; 315-317].

He was transported to the Los Angeles County Hospital for treatment of his tubercular condition before trial [C. T. 23; R. T. 364-369].

He was represented vigorously at the trial by Lynn McDougall, an experienced criminal lawyer [R. T. 282]. McDougall testified he contacted Melvin Jackson, a co-defendant, in the absence of his counsel, and Jackson agreed to testify that Jackson drove the vehicle and that appellant wasn't present when Adams bought the heroin and put it in the vehicle [R. T. 272-234].

Jackson didn't recall any such discussion, but didn't talk to the prosecutor nor any government agent [R. T. 250; 268-269].

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[2] "R. T." refers to the Reporter's Transcript.

His attorney informed appellant's attorney that Jackson would refuse to testify. A stipulation was entered into during the trial that if called Jackson would testify that he drove the vehicle [C. T. 21; R. T. 53-58D].

V

ARGUMENT

A. APPELLANT WAIVED ALL CLAIMS OF ERROR.

Appellant waived any right to claim error on the questions presented in this appeal. These matters could have been raised in the trial court and on the previous appeal. See Hammond vs. United States, 356 F. 2d 931 (9th Cir. 1966).

In Grimes vs. United States, No. 21,659, 9th Cir., June 6, 1968, often-repeated language is used as follows: "Consequently, the rule is applicable that Section 2255 may not be invoked to relitigate questions which were or should have been raised on a direct appeal from a judgment of conviction." (Emphasis supplied)

The trial record clearly shows that appellant was aware of all issues raised here during his trial and his appeal.

This entire appeal is premised on grounds which should have been objected to at the trial level in this case. As to failure to object acting as complete waiver, this court said in White vs. United States, 315 F. 2d 113, 116 (9th Cir. 1963), Cert. den. 375 U. S. 821:

"Even had there been a taint of unfairness or prejudice, no voice was raised in protest - no objection ever raised - no chance given the trial court to cure any alleged error. This is a complete waiver."

Calculated decisions made by his attorney, and known to him, are binding on appellant.

Grimes vs. United States, supra;

Poole vs. Fitzharris, No. 20,925, 9th Circ., June 12, 1968;

Schawartzberg vs. United States, 379 F. 2d 551 (2nd Cir. 1967).

B. ASSUMING ARGUENDO THAT APPELLANT HAS NOT WAIVED HIS RIGHT TO BE HEARD ON THIS ACTION, HE HAS NOT CARRIED THE BURDEN OF PROOF UPON ANY POINT ALLEGED.

A motion under 28 USCA 2255 requires the petitioner to prove his allegations by a preponderance of the evidence. In other words, the burden of proof is on the petitioner. Mealer vs. United States, 383 F. 2d 849 (9th Cir. 1967).

C. APPELLANT WAS NOT HELD INCOMMUNICADO AS CLAIMED.

Lt. Roger Hollingsworth, Chief Jailer, testified unequivocally that prisoners were allowed two and possibly more telephone calls [R. T. 300].

Appellant drew one dollar in cash and the probable purpose for which money could be drawn was for the telephone. Cash was not used

for commissary purchases [R. T. 306-307].

Appellant was taken to the U. S. Commissioner on Monday [R. T. 262]. Appellant was also taken to the Imperial County Hospital on September 26, 1967, and September 28, 1967 [R. T. 349].

He was also permitted to write and receive letters and have visitors [R. T. 348].

Owen I. Miller, Jr., and Agent Quick testified that appellant was informed of his right to make phone calls.

Assuming arguendo, that appellant was held "incommunicado", as claimed, he has neither alleged nor proven any resulting prejudice. United States vs. Angelet, 265 F. 2d 155, 157 (2nd Cir. 1959).

D. APPELLANT WAS NOT DENIED THE TESTIMONY OF A FAVORABLE WITNESS.

During the trial, Mr. Jackson's attorney, Joseph Bryan, apparently informed appellant's counsel that Jackson would claim the Fifth Amendment.

Appellant didn't call Jackson as a witness. Government counsel stipulated to everything requested by counsel for appellant — that Jackson would testify that he was driving the car, and that Hammond was not. Jackson's criminal record was not used for impeachment purposes.

Appellant seemed satisfied with this stipulation.

Jackson was entitled to claim the Fifth Amendment. He could

probably be prosecuted under California State law and for conspiracy under Nevada law.

Appellant assumes there was wrongful and coercive conduct on the part of the counsel for the government.

The record clearly refutes this. Mr. Bryans remembers being in the Federal Building and that Mr. McDougal was angry [R. T. 290-293].

Jackson testified that Government counsel never talked to him about his case, testifying or not testifying [R. T. 256]. No agent of the government told him not to testify [R. T. 258]. He testified that he didn't remember talking to anyone [R. T. 268-69].

Jackson admits that he told the officers that there was no heroin in the trunk [R. T. 260], and that none of the four men acquired any heroin in Mexico [R. T. 264].

Jackson never told anyone that he would testify [R. T. 268-269].

Appellant's original counsel claims to have talked to Jackson, while knowing that he was a defendant, and in the absence of Jackson's counsel, Mr. Bryans, and claims to have extracted a promise to testify. He claims to have been surprised when Jackson's attorney appeared in Court.

Government counsel denied discussing Jackson's claiming the Fifth Amendment with anyone until McDougall informed him of the developments. A stipulation was then entered into [R. T. 71].

Counsel for appellant said, "First your Honor, we have this

stipulation and I would ask that you read it." [R. T. 71] He seemed satisfied with the stipulation.

Appellant presents a discussion on his failure to join in any waiver by not objecting and not raising points on appeal. The cases relied on refer to such basic rights as jury waiver that are traditionally joined in by appellants. Certainly these cases don't apply to decisions involving objections during trial and points to be raised for appeal.

See the reasoning in Gray vs. United States, 345 F. 2d 282, 288-289 (9th Cir.), Cert. den., 382 U. S. 919 (1965).

E. REMARKS OF GOVERNMENT COUNSEL WERE NOT PREJUDICIAL UNDER THE CIRCUMSTANCES.

One small paragraph out of a total argument of 21 pages is cited by appellant. The trial court held that the remark was a proper inference from the evidence presented. See Thomas vs. United States, 392 F. 2d 44 (9th Cir. 1968), and United States vs. Sacony Vacuum Oil Co., 310 U. S. 150, 239, 241-242 (1939). This court held in Green vs. United States, 282 F. 2d 388 (9th Cir. 1960), Cert. den., 365 U. S. 804, that the final argument in a case may contain, and counsel are permitted to argue, all reasonable inferences that can be drawn from the evidence adduced.

No objection was made to the remark by counsel. Objection gives the Court a change to correct the error. Olar vs. United States, 391 F. 2d 773 (9th Cir. 1968).

F. APPELLANT WAS NOT DENIED A SPEEDY TRIAL.

There was minimal delay because of appellant's tubercular condition, necessitating his removal to the Los Angeles County Hospital. The delay was not purposeful and oppressive and appellant claims no prejudice. See Maquire vs. United States, 21,659 (9th Cir., June 6, 1968), and cases cited therein.

A case very close on its facts held that removal of a defendant for medical treatment and a delay of bringing him before a court for three months was not unreasonable. United States vs. Theriault, 268 F. Supp. 314 (W.D. Ark. 1967).

G. GOVERNMENT COUNSEL'S COMMENTS ON FAILURE TO CALL WITNESSES WERE ENTIRELY PROPER.

No specific mention was made of Jackson's failure to testify, and since he testified by stipulation, the jury was entitled to wonder why appellant didn't call Townes and Adams.

Forsberg vs. United States, 351 F.2d 242 (9th Cir. 1965), Cert. den., 383 U.S. 950.

Again no objection was made during the trial. This constitutes a waiver.

More important, however, the remarks, if found to refer to Jackson, were merely responsive to appellant's counsel's specific remarks on the government's failure to call Jackson, knowing that he

had claimed the Fifth Amendment [R. T. 131].

See Himmelfarb vs. United States, 175 F. 2d 924 (9th Cir. 1949), Cert. den., 338 U. S. 860.

It is indeed ironical that appellant, having gained the benefit of a stipulation when the testimony was otherwise unavailable, and having additionally avoided the impeachment of the defense witness, Jackson, now complains that he should have received more than this. Appellant was not entitled to Jackson's testimony, as Jackson relied upon the Fifth Amendment [R. T. 273-74]. Even if he had testified as a defense witness, he could have been seriously impeached, not only as a result of his criminal record but also because he had told an officer that he knew nothing about the heroin, while appellant apparently contends that Jackson would have testified that appellant was innocent and that one Adams had told him that the heroin was there [R. T. 248-49, 284, 295]. Thus the stipulation was a gift to appellant, as the government lost the opportunity to impeach the defense witness.

Of course, appellant contends that the Government caused Jackson to rely upon the Fifth Amendment, but there is absolutely no evidence to support this suggestion. While it may be fashionable to impute sinister motives to prosecuting attorneys, we have not yet reached the point at which such flights of fancy may substitute for a complete lack of evidence. This portion of appellant's case is plainly frivolous.

The irony of this appeal is compounded by the fact that appellant objects to remarks concerning failure of appellant to call witnesses, which remarks obviously and properly referred to Adams and Townes, as Jackson was a witness by stipulation. Appellant's trial counsel had earlier incorrectly informed the jurors that "The government certainly had an opportunity to bring in Mr. Jackson . . ." [R. T. 131]. This, of course, was not true.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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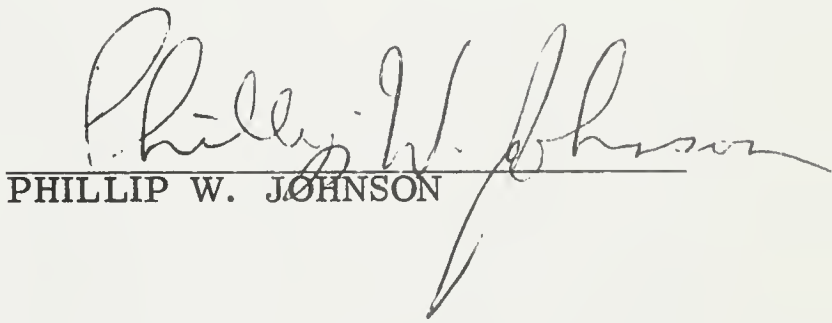
United States Attorney

SHELBY R. GOTT
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



PHILLIP W. JOHNSON